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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

HEARING DENIED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEE'S REPLY TO AMICUS CURIAE BRIEF FILED BY THE UNITED STATES SOLICITOR GENERAL.

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I

Introduction

The Solicitor General of the United States has been courteous enough to furnish us with a partially completed

typewritten copy of the brief which he proposes to file in this matter.

Following receipt of this partially completed typewritten copy there is of course no time to prepare a complete reply and certainly no time to have a reply printed.

It may be that the rules of the United States Supreme Court will not permit us to file this very brief reply in typewritten form but in any event we submit herewtih a summary reply to the contentions made in the Solicitor General's amicus curiae brief as it has been submitted to us.

II

Comments on Statements and Contentions Found in the Amicus Curiae Brief of the Solicitor General

(a) At page 10 we find the following statement: "Neither Appellee nor the Court below questions that designation (of beneficiary) nor disputes the fact that the beneficiary so designated was the one intended by the insured to receive the proceeds." This statement is only half true. Neither the Appellee nor the Court below questions the *designation* of the mother as beneficiary. We do not concede, however, that the beneficiary so designated was the one intended by the insured to receive the proceeds. The Record in this case (R. 19-21) discloses that the deceased had sent his community earnings to a bank for the purpose of purchasing bonds for one Naomi Beiler and that he sent a considerable sum of money, approximately $3,000.00, to his parents asking that they use the money, with the exception of $500.00, for the same purpose. As Justice Adams comments (R. 21), the evidence indicated that the deceased was attempting to "further plans which decedent was making for his future from which she (the wife) was to be excluded". The Appellee has no knowledge of the arrangement between the deceased and his parents concerning the

final disposition of the proceeds of the insurance after they reach the hands of the parents but in view of the provisions made by him for Naomi Beiler, it is improper for the Solicitor General to say that the Appellee does not dispute the fact that the beneficiary designated was the one intended by the insured to receive the proceeds unless it is intended that this statement contemplate only the temporary receipt of the proceeds and not the ultimate use thereof.

This very situation points up our contention that the construction of the act contended for by the Solicitor General would permit the soldier, by a secret agreement with his government and by secret arrangements with the beneficiary named, to defraud his wife of property by diverting the proceeds of the insurance to some other woman in whom he may have become interested to the exclusion of his wife. The dislocations of family life resulting from war make such possibilities quite imminent and, conservatively speaking, we feel it is doubtful that Congress would intend to foster such a result.

(b) At page 32 of the typewritten copy of the Solicitor General's brief, we find a footnote containing this statement: "Equally lacking in merit is the assumption made by the Court below that the premiums on the N. S. L. I. policy in this case were paid from community funds (R. 21)".

We feel that the Solicitor General neglected to observe the fact that the complaint in this case alleged that the premimums on the policy were paid with the earnings of the deceased *and that the earnings were the community property of himself and his wife*, (R. 3, para. 2) and that this allegation of the complaint was not denied by the answer.

As the matter now comes before Your Honors, it would appear to be an admitted fact, contrary to the Solicitor General's statement, that the funds used in the purchase of the N. S. L. I. policy in question were community funds.

The Solicitor General even contends that under California law a soldier's pay is not community property. He goes back almost to the days of '49, certainly to the time of the Civil War, for a case in support of this contention—*Packard* v. *Arrelanes*, 17 Cal. 525, 531, and completely ignores the subsequent amendments to the California community property laws and the decision of the Supreme Court of California in *French* v. *French*, 17 Cal. (2d) 775 at 777, 112 Pac. (2d) 235.

The Solicitor General also ignores the fact that in the very case which he cites, namely, *Packard* v. *Arrelanes*, the Spanish law which he claims to be the basis of the California community property statute is quoted at page 532 as follows:

> "If he (the husband) be in the army without pay, at the expense of himself and his wife, whatever he may earn in this way (we assume this probably means by pillage or some similar method) be it all the husband's and wife's; for even as the cost is common to both let what they may earn in that way be common to both. What above is said of the earnings of husband's, let the same be as regards those of wife's."

For further support of his contention, the Solicitor General cites the Superior Court decision of *Johnson* v. *Shelton* in which a Superior Court Judge overruled his associates on the Superior Court bench in Los Angeles, overruled the Appellate Court of the State of California in its decision in the instant case, and was in turn overruled three weeks later by the Supreme Court of California denying a hearing in this case.

(c) At page 31 of the typewritten copy of the Solicitor General's brief, he argues that the opinion of the Appellate Court in the instant case "be contrasted with the recent opinion of another California District Court of Appeals

in *Kauffman* v. *Kauffman*, 93 ACA 966 at 972", and sets forth a quotation from that decision. The Solicitor General neglects, however, to point out that the Court in the *Kauffman* case, at page 972 said

> "We are not dealing with such a situation as was presented in Wissner vs. Wissner, 89 Cal. App. (2) 759, 201 Pac. (2d) 837. In that case the widow of the insured claimed a right to one-half of the proceeds of a national service insurance policy as against the named beneficiaries on the basis that all of the insurance premiums were paid with community earnings or funds. It was there held that the wife had a vested interest under the community property laws of this state and that she was therefore entitled to one-half of the proceeds of the policy.
>
> "In the instant case the record is silent as to the source of the premium payments. Such payments may have been made entirely from separate funds of the insured to and including the date of the property settlement agreement and thereafter from community funds of the insured and defendant herein . . . ."

At the same page the Solicitor General says "no federal court nor any state court heretofore has cast any doubts on the act's constitutionality". The fact is that the question involved in this case has, so far as we can determine, never been before a Court wherein the opinions are published. We believe the Solicitor General has in mind such cases as *Barton* v. *United States*, 75 Fed. Sep. 703, relied on by him at page 20 of typewritten brief under his heading II; *Pack* v. *United States*, 176 U. S. Fed. (2) 770, referred to by him on page 18 of his typewritten brief under subdivision (b) of his section numbered I; and *James* v. *United States*, No. 6061-B. H.; S. D. Calif., cited at page 33 of his typewritten brief under subdivision (c) of his section numbered III.

As we have previously pointed out in briefs on file in this Court, none of these cases considered the constitutionality of the act in question if it was construed to deprive a California wife of her right to enforce her community property interest against the beneficiary who had received the proceeds. *Barton* v. *United States* contained dictum on the question but it was not essential to the decision. *James* v. *United States* was not in point because it involved Texas law which requires that the wife show fraud, and *Pack* v. *United States* specifically refused to determine whether or not a wife in California could impress the proceeds in the hands of the beneficiary with a trust in her favor. As the Solicitor General concedes, the dictum in the *Pack* case lends support to the conclusion reached by the California Appellate Court in this case.

In other words, these three cases, like the *Kauffman* case and others that have considered allied matters, do not by any stretch of the imagination directly determine the question of whether or not the destruction of the wife's right to protect her community property interest is or would be a violation of the Fifth Amendment to the Constitution.

(d) At page 19 of the Solicitor General's typewritten brief, at the very end of his section numbered I, he makes this statement:

> "And this Court has completely dispelled any doubt that the 'scope, nature, legal incidents and consequences' of this relation, as well as any interferences therewith, raise federal questions governed only by federal law free from modification by state law . . ."

He cites in support of this statement *United States* v. *Standard Oil of California*, 332 U. S. 301, and in his footnote quotes from that case.

We desire to direct the Court's attention to the fact that the quotation set forth by the Solicitor General in the foot-

note of his page 19 shows that *the Supreme Court recognized the fact that relations between soldiers and persons outside the armed forces or nonfederal governmental agencies are not subject to the same rule.* The Court reserved discussion of this question by saying "*to whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies* the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority."

In the instant case we are not concerned with the relations between the soldier and his government nor the relations between the soldier and the Veterans Bureau. The relation that is involved is the relationship between the soldier and his wife. The question of whether or not the wife could request the United States government or the Veterans Bureau to do or refrain from doing any act is not involved. The question of whether or not the United States is required to pay any particular sum to any particular person is not involved. Here we have to do only with the situation after the United States government, through the Veterans Bureau, has paid an amount admittedly due and has finished every duty required of it under its contract with the soldier. *The judgment does not purport to give the wife a right to receive any specific amount but only accords her her community interest in such amounts as may be paid by the United States government under whatever liability it admits it has in accordance with its contract.*

We believe the reservation which we have mentioned, found in the decision in *United States* v. *Standard Oil Company of California*, shows that it is not authority for the Solicitor General's position in this matter.

(e) At page 22 of the typewritten copy of the Solicitor General's brief, under his section numbered II, subdivision

(b), he quotes section 602 (i) of the N. S. L. I. Act to the effect that "no person shall have a vested right to any installment or installments of any such insurance . . ." and throughout the brief the Solicitor General contends that this is exactly what is meant, yet in the case of *Lynch* v. *United States*, 292 U. S. 571, 78 L. Ed. 1438, this Court held that the soldier did have a vested right to installments of disability payments and that the efforts of Congress to detract from that right in the socalled "economy act" would be violative of the Fifth Amendment.

(f) At page 28 of the typewritten copy of the Solicitor General's brief, under his section numbered III, subdivision (b), in a footnote, there is an attempt to distinguish cases such as *Gaskins* v. *Security First National Bank*, 30 Cal. App. (2nd) 409 and the Solicitor General indicates that he disagrees with these decisions. There is no indication, however, as to why the Solicitor General has never seen fit to appear in Court and oppose decisions of this character protecting the wife's right to use Court process in obtaining the proceeds of a veterans insurance policy. Neither is there any explanation of the silence of the Veterans Bureau on this point or the silence of Congress on this point when, in 1940, this whole matter was under consideration by Congress and the National Service Life Insurance Act was passed and merely made subject to Section 454(a) of Title 38 without any further consideration of the exemption questioned.

We believe it to be impossible for the Solicitor General, or anyone else, to reconcile the many decisions similar to *Gaskins* v. *Security First National Bank*, *supra*, which decisions are cited at page 33 *et seq.* of our brief, with the contention of the Solicitor General that the proceeds of insurance in the hands of a stranger should not be subject to process of Courts for protection of the wife's community property rights.

Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 140, is cited in support of the Solicitor General's contention that the due process clause does not prohibit the United States "from annulling private rights even if they exist and have actually vested, so long as the action taken falls within some paramount federal power" (P. 28 of typewritten brief, subsection (b) under section numbered III).

Unless we misread this case, it is not authority for this contention. We understood the decision in that case to hold that the United States *is subject to the Fifth Amendment even when acting under the war power*. The Court pointed out that the act in question did not completely destroy property rights but that it gave those who possessed the property rights seven months in which to dispose of their liquors.

We think there is a good analogy between that decision and the present case. We concede for the purpose of this argument that the United States can limit the wife's protection of her property rights by preventing her from compelling the United States to make any payments to her providing they allow her the limited right to protect her interests when the funds are in the hands of the beneficiary. It is true that this limitation may amount to a destruction because the beneficiary may be unable to respond to the Court process. This would be a situation comparable to that involved in *Hamilton v. Kentucky Distilleries etc., supra*, where those owning liquor were given seven months in which to dispose of it. If they were unable to dispose of the liquor in seven months, their property rights were lost and the limitation would, to that extent, amount to a destruction but the Supreme Court said this is not taking property without due process. Likewise, we will assume, for the purpose of this argument, that the Court would say that the limitation of the wife's rights to action against a person other than the United States in whose hands she found her

property may not be taking her property without due process.

(g) On page 29 of his typewritten brief, under subsection (b), section numbered III, the Solicitor General says "where Congress in the exercise of an admittedly granted power *has adopted a means reasonably adapted to achieve a legitimate end*, such legislation has withstood constitutional challenge . . ." (Emphasis ours.)

The Solicitor General does not, however, present any argument to indicate that the destruction of the wife's right to protect her community property interest in the state Courts was a means reasonably adapted to achieve the legitimate ends on which he upholds the constitutionality of the construction of the act which he contends for. At page 12 of the typewritten copy of his brief, under his subsection (a), section numbered I, the Solicitor General sets forth four powers of Congress as encompassing the legitimate ends in question, namely,

"a. To . . . provide for the common defense and general welfare of the United States.

b. To declare war . . .

c. To raise and support armies. . . .

d. To provide and maintain a navy. . . .

e. To provide for calling forth the militia. . . ."

It seems to us that the argument set forth in the Solicitor General's brief would be more persuasive if in some manner he could demonstrate to this court that the destruction of Margaret Wissner's right to protect her community interest in the Courts of California was a means reasonably adapted to achieve one of the legitimate ends which he sets forth.

(h) The Solicitor General, in his typewritten appendix (b) sets forth correspondence and letters which are not a

part of the evidence in this case and we doubt that such evidentuary matter is properly introduced at this time. We have requested the Solicitor General to delete this matter from his proposed brief but inasmuch as it may not be deleted, we desire to make the following comment.

Appendix B and comment thereon in other portions of the brief, are directed toward the contention that administrative construction of the N.S.L.I. Act should be given great weight. In this case we bowed to the administrative construction to the effect that the United States would not deliver directly to Margaret Wissner her share of any proceeds which the Veterans Bureau admitted it was liable to pay and we sought our remedy in what we believed to be an appropriate form.

We do not believe, however, that administrative construction extending the provisions of the act to destroy the widow's rights to the assistance of her state Courts after the proceeds have left the hands of the Veterans Bureau should control this Court in determining whether or not there was any such intent on the part of Congress and if there was such an intent, whether or not it was constitutional.

The Solicitor General points out the fact that if our contention is sustained, the widow's rights will be different in different states. We do not conceive this to be a seriously important argument. Every state has its own method of protecting the marital rights of women. The method adopted by the community property states is different from that adopted in states such as New Hampshire, as demonstrated by the case of *Ibey* v. *Ibey*, 93 N. H. 434, 43 Atl. (2d) 157, referred to at page 30 of our brief, but the purpose of the laws of the various states concerning a wife's interest in accumulations during marriage is basically the same, namely, to give some protection to her. These varying forms of protection under the decision of

the California Appellate Court in the instant case will in no wise affect the Veterans Bureau or the United States. The wife will be protected according to the state laws fixing the property interests of their respective citizens and it seems to us this is a proper result to look forward to.

At page 29 of the typewritten copy of the Solicitor General's brief under subsection (b) of the section numbered III, the Solicitor General cites the case of *Ruddy* v. *Rossi*, 248 U. S. 104, having to do with the exemption of homesteaded lands from "any debt or debts" and gains some comfort from the decision in that case holding that the homesteaded land was not subject to the creditor's claims which had been asserted. The Solicitor General does not, however, make the contention that this Court would have held that the California wife who, after marriage, aided her husband in proving up a homestead, using community funds therefor, would have no right to the protection of the California Courts in asserting her community interest. We doubt that the Solicitor General would make such a contention and certainly we doubt that if it was made it would be sustained. The latter situation, however, is analogous to the one now presented to this court.

(i) The Solicitor General devotes a considerable portion of his brief to the contention that the rights and obligations under a contract between the United States and others must be answered in the light of federal rather than state law. We do not doubt this contention but it is our belief that it has no particular bearing on the question before the Court. If the United States enters into contracts as it would with a ship builder, airplane manufacturer, and others in California, we are not contending that the rights and obligations of the United States and the ship builder or the airplane manufacturer would be determined by state law. We contend, however, that after the United States

paid compensation to the ship builder or the airplane manufacturer in California, that compensation would become community property of himself and his wife if they were both residents of California during the operation and we contend further that if the United States government sought to take away the wife's right to protect her interest in that compensation, it would be violative of the Fifth Amendment of the Constitution even though the contracts involved were war contracts and were made under the authority of the provisions of the United States Constitution set forth on page 12 of the typewritten copy of the Solicitor General's brief which we have above referred to.

We think the same principal applies to the particular war contract under consideration in this case and that after the proceeds of the soldier's investment in insurance are paid by the United States, the wife certainly should not be prevented from resorting to the state Courts for protection.

(j) At page 32 of the typewritten copy of the Solicitor General's brief, under subdivision (c) of III, he quotes with approval language found in the Superior Court decision of *Johnson* v. *Shelton* to this effect:

> "In one aspect such pay (soldier's pay) represents a gift by the government rather than earnings because the government can compel any person to serve in its armed services without pay. *United States* v. *Williams*, 322 U. S. 46".

If the Solicitor General is impressed with the reasoning of the Superior Judge in that case, it would be entirely logical for him to intercede in behalf of Naomi Beiler to protect her right to the bonds which Major Wissner's parents were supposed to purchase for her with community funds. The funds in question were the earnings of the

soldier and under the language of *Johnson* v. *Shelton* approved by the Solicitor General, these earnings were a gift and Naomi Beiler should be entitled to her bonds. The soldier wanted it that way and perhaps if the reasoning of the Solicitor General in appearing against the widow in this case were carried to the ultimate conclusion, it would be proper for him to take up the cudgel in behalf of Naomi Beiler and against the parents of the deceased soldier who, up to the time of the trial of the action, had failed to respect his wishes by purchasing the bonds for her.

We think perhaps the language of *Johnson* v. *Shelton* to the effect that the soldier's earnings are a gift from the government is a little far fetched. Reasoning from the same premise, we might say that the earnings of everybody in wartime are a gift from the government because the government could draft all of us into universal service and require that we serve without pay therefor; since we are permitted to continue our homely pursuits, whatever we make is a gift from the government and our wives can have no interest therein.

On this point and also in connection with the statement of appellants' counsel that the soldier husband could freely gamble the community property, the holding of the California Supreme Court in *Estate of Gold*, 170 Cal. 621 is most interesting. In this case the deceased husband Gold was in partnership with one Sullivan in conducting an illegal gambling business. Gold died and Sullivan, being an honest gambler, paid over to Gold's estate the agreed share of the latter in the profits of the gambling enterprise. The widow of Gold brought a proceeding against the estate to determine heirship, claiming that the profits derived from the gambling venture were community property and that she was entitled to them. The administrator contended

that the profits from the gambling paid to the estate by Sullivan were a gift because Sullivan could not be compelled to make the payment since the gambling enterprise was illegal. The Supreme Court of California said:

> "When Sullivan needed money with which to gamble, he would take it from the bank and when the games were concluded, he would deposit to the partnership account his gains therefrom. Whether he was under obligation to do this or not, the fact remains that he did so. There was no intent by Sullivan to make a gift to Gold. There was an agreement by him to pay half the profits to Gold, an agreement which he recognized as binding and which he faithfully carried out, whether legally good or not. He paid Gold this part of his gambling profits in return for the services of Gold in running the saloon, and thus attracting thereto the class of persons likely to engage in the games Sullivan was carrying on. There was a consideration rendered by Gold. The part of the profits turned over to him was not a gift. It was property acquired by the husband during marriage otherwise than by gift, bequest, devise, or descent, and therefore, under section 163 of the Civil Code, it is not his separate property, but, under section 164, it is community property of the marriage. The plaintiffs, therefore, cannot rightfully complain of the action of the court in holding property so acquired to be community property."

In the instant case, the husband invested the community funds in the insurance policy. It may be that the wife could not enforce any claim against the United States but since the United States, like Sullivan, was honest, recognized its obligation, and paid the proceeds contracted for by the soldier, the wife's community property interest attached to those proceeds; they are community property and she is entitled to recover her interest.

III

Conclusion

We frankly admit that it is quite impossible for us to present a reply to the Solicitor General's brief that satisfies us because the extremely limited time will not permit. We believe, however, that the Solicitor General continually fails to recognize the fact that the decision of the California Courts does not affect "the distribution of N.S.L.I. proceeds" by the Veterans Administration but that it leaves that situation exactly as it has been. The government, through the Veterans Administration, can still distribute the proceeds exactly as the contract in question provides. As we have previously indicated, it is very difficult for us to understand why the Veterans Administration and the Solicitor General make war against the war wife or the war widow. We earnestly believe that straight and unbiased thinking on the part of the Veterans Administration and the Solicitor General would lead to the conclusion that they should not enter a contest of this character against the widow. They have never sought to interfere to prevent the protection of the wife in her claims against the proceeds of veterans insurance in the hands of the veteran. Their lack of activity in connection with that matter seems hardly reconcilable with their zeal in joining a stranger who made no contribution to the community as against the wife.

The Solicitor General, at one point in his argument, stated that there was nothing to indicate that Margaret Wissner was destitute or in need of this help or in need of her rightful share of the community property, taking the position that the cases which gave the wife the benefit of court process in obtaining her share of the proceeds from the veteran himself were cases where the wife's need or destitute condition was shown. These cases do not place her right on

any such basis. The wife's right to obtain her share of the proceeds in the veteran's hands is simply the right of the wife recognized in all states to a share or a fair measure of interest in the husband's earnings and in the property accumulated by him after marriage, having in mind the customary method of living and the amount of the earnings and accumulations.

We believe the same principals impelling the decisions of the courts on the subject of the wife's right to obtain her share of the proceeds in the veteran's hands lead to the conclusion that she should be permitted to obtain her community property rights through the State Courts as against strangers who possess community property.

Dated at Modesto, California, December 1, 1949.

Respectfully submitted,

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